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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 630

IDAHO POWER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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* *Note:* The printed Joint Appendix (pp. 1-95) filed with this Petition is as printed and filed in the Court below, and is included within the Clerk's certification of the Record below. For convenient reference, pages in the printed Joint Appendix are cited in this brief as JA 1-95.

The balance of the Record below, also included within the Clerk's certification filed herein, consists of typewritten pages numbered 96-120. References to such pages are cited herein as R. 96-120.

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Petitioner, Idaho Power Company ("Company"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered on June 4, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 1a, *infra,* 1a), rendered on June 4, 1965, is reported in 346 F. 2d 956, where it also appears that rehearing was by that Court denied by order entered July 8, 1965. A copy of said opinion and the judgment below are attached to this petition as Appendix A (in addition to being in-

cluded in the certified Record (R.) from the Court below (R. 113-118).

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1965 (R. 118, *infra,* 7a). Petition for rehearing, timely filed, was denied on July 8, 1965 (R. 119).

Jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act, 16 U.S.C., Sec. 825*l* (*infra,* 5-6); also 28 U.S.C., Sec. 1254(1); and Section 10 of the Administrative Procedure Act, 5 U.S.C., Sec. 1009 (*infra,* 6-9).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission (Respondent) has the legal authority to, in 1964, base its actions upon a theory that a license issued in 1955, which together with amendments added in 1958, 1959 and 1960, had been accepted by the licensee (Petitioner), was an "open-end" document subject to change in any respect when approval of design plans for transmission lines necessary to complete the licensed project was requested.

2. Whether the Commission violated Section 6 of the Federal Power Act (*infra,* 4-5), which provides in part that licenses "*may be altered * * * only upon mutual agreement between the licensee and the Commission* * * *" (Emphasis supplied.) when in 1964, over the objection of the Licensee, it added a new Article to an existing license (Project No. 1971) issued in 1955, which new Article required that the licensee (Petitioner) "wheel" power generated by Federal plants over all project transmission lines, including the transmission lines specifically licensed in 1958, 1959 and 1960,

in addition to "wheeling" such power over the new line for which application for approval was then pending before the Commission.

3. Whether a material alteration of the license requirements was, as to transmission lines previously licensed and constructed, a violation of the established concept that a Federal Power Commission license duly issued and accepted is a contract binding upon both the licensee and the United States and Commission.

4. Whether the Commission was in error in failing to differentiate between transmission lines previously licensed and constructed, and a new line for which application was then pending, with respect to its power to establish a condition with respect to "wheeling" requirements.

5. Whether the Commission has exceeded its legal authority in adding a requirement for "wheeling" of Federal power over all project lines, including those previously specifically licensed and constructed, in a case where neither the original license issued in 1955 nor the subsequent license amendments for transmission lines which had been heretofore constructed imposed any such wheeling requirements.

*CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, Constitution of the United States, 1 U.S. Const. Anno. 35:

> 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

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* Emphasis (by italics) supplied.

Section 3(11) of the Federal Power Act, 16 U.S.C. 796(11):

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

* * *

(11) *"project" means complete unit of improvement or development, consisting of* a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, *the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,* all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

Section 6 of the Federal Power Act, 16 U.S.C., Sec. 799:

Licenses under sections 792, 793, 795-818, and 820-823 of this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, *which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be* revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be *altered or surrendered only*

upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of sections 792, 793, 795-818, and 820-823 of this title and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41. June 10, 1920, c. 285, § 6, 41 Stat. 1067; Aug. 26, 1935, c. 687, Title II, § 204, 49 Stat. 841.

Section 28 of the Federal Power Act, 16 U.S.C., Sec. 822:

The right to alter, amend, or repeal this chapter is expressly reserved, but no such alteration, amendment, or repeal *shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder.* June 10, 1920, c. 285, §28, 41 Stat. 1077.

Section 313(b) of the Federal Power Act, 16 U.S.C., Sec. 825*l*(b):

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the

filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, *subject to review by the Supreme Court of the United States upon certiorari* or certification as provided in sections 346 and 347 of Title 28.

Section 10 of the Administrative Procedure Act, 5 U.S.C., Sec. 1009:

§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due

account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

28 U.S.C., Sec. 1254(1):

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

STATEMENT OF THE CASE

This action arises out of an application filed by Petitioner with Respondent on September 9, 1963, requesting approval of exhibits transmitted therewith relating to a double circuit steel tower transmission line running from Petitioner's Brownlee power plant to a main transmission substation at Boise, Idaho, the line being named Brownlee-Boise Lines Nos. 3 and 4. On July 24, 1964, Respondent issued its "Order Amending License to Authorize Transmission Lines," 32 F.P.C 342 (JA 61-69), which imposed "wheeling" conditions, referred to in more detail hereinafter, on both the line involved in the application and also all project lines previously licensed, together with limitations and restrictions on Petitioner's use and operation of said lines. Application for rehearing was denied by the Commission on September 15, 1964 (JA 80-83).

Petitioner, being a party aggrieved by said order, a licensee of the Commission and a public utility having its principal place of business in Boise, Idaho, within the Ninth Circuit of the United States Court of Appeals, invoked the jurisdiction of said Court under

Section 313(b) of the Federal Power Act, 16 U.S.C., Sec. 825*l*(b), (*infra*, 5-6). Timely petition for review in the United States Court of Appeals for the Ninth Circuit was filed on October 23, 1964 (R. 97), and said Court affirmed the Order of the Commission on June 4, 1965 (346 F. 2d 956, R. 113-117, *infra*, 1a). Rehearing was denied by that Court on July 8, 1965 (R. 119).

The transmission circuits involved were required to complete the Brownlee-Oxbow-Hells Canyon project of Petitioner which was licensed as Project No. 1971 by Respondent on August 4, 1955, 14 F.P.C. 55 (JA 3-11). This license had been accepted by Petitioner in accordance with Section 6 of the Federal Power Act on August 9, 1955 (JA 11-12). The licensed project consisted of three hydroelectric dams and power plants located on the Snake River where it forms a boundary between Oregon and Idaho, being the Brownlee, Oxbow and Hells Canyon units. These three developments were found to be a "single project" (JA 7) and were described in detail in the license to include the three dams and power plants, *"and transmission facilities"* (JA 6-7). The license provided an orderly time schedule for these units; the construction of Brownlee to begin within one year and the last unit, Hells Canyon (now under construction), to be completed in nine years.

It obviously being impossible at the time of the issuance of the license to determine to what load centers or system connections transmission lines would be required, or the appropriate timing of construction and capacity of such lines, the Commission by Finding 55 and Article 45 (JA 8, 10) reserved for future determination "the question of what transmission lines and

appurtenant facilities, if any, shall be included in this license." Also, by Article 45 (JA 10), it reserved "the right to determine at a later date the question of what transmission lines and appurtenant facilities, if any, shall be covered in this license and included as a part of the project works." And provided in Article 29 (JA 9) that the "Licensee shall not begin construction of any unit until the Commission approves the exhibits relating to that unit." This license was formally accepted in writing by Petitioner (JA 11).

As construction of this over-all project continued, and as the location, capacity and necessity of transmission lines leading from the generating plants to Petitioner's primary transmission system were determined, the Petitioner filed requests for approval of exhibits for each of these lines. In each instance, the Respondent ordered an amendment of the license to include the lines for which exhibits were filed and Petitioner, in turn, formally accepted these amendments in writing (JA 13-39). Four transmission lines had been handled in this fashion prior to 1963. In neither the original license nor in any of the amendments covering the four needed transmission lines was there included any provision requiring the wheeling of Federal power (*infra,* 3a, R. 114) or any restrictions or limitations requiring the lines to be used for any purpose other than for transmitting power generated by Petitioner to its own transmission system and customers.

On September 9, 1963 (JA 39-41), as described above, Petitioner requested approval of the exhibits for the next transmission line required for the transmission of energy from its hydroelectric generating plants to its load centers. After a delay of more than ten months, Respondent, on July 24, 1964, issued its order (32

F.P.C. 342, JA 61-69) adding to the license a new Article 49 (JA 64-68) providing that "The construction and operation of the Brownlee-Boise Bench Nos. 3 and 4 transmission lines shall be subject to the following special conditions:"—and then setting forth, in ten separately numbered paragraphs, conditions requiring the "wheeling" of Government power, *not only over the lines covered by the order, but also over all project lines covered under Respondent's previous orders,* and also limiting and restricting materially the manner in which all of Petitioner's said lines could be used and operated (JA 64-68).

Application to the Commission for rehearing, timely filed, was denied by the Commission's order of September 15, 1964, (JA 80-83). Because of the urgent need for the immediate construction of these two lines, the Commission deemed it appropriate and stated (JA 82) that Petitioner's acceptance of this license order, including the requirements of the new Article 49, might be "accompanied by a reservation on the part of the licensee to object, upon timely court review of the Commission's order, to the lawfulness of the wheeling condition." Such reservation on acceptance of the license amendment was duly filed by Petitioner (JA 93-95), and Petition for Review was thereupon filed with the United States Court of Appeals for the Ninth Circuit (R. 97-110).

The Court of Appeals affirmed the order of the Respondent, basing its affirmance as to the imposition of wheeling requirements upon existing lines on what is believed to be an erroneous conception and statement, that these existing lines "are not, as petitioner argues, included within the license * * *. No agreement has been reached as to them." (R. 117, 346 F. 2d 956, at 959, *infra,* 6a).

REASONS FOR GRANTING WRIT

1. There is involved in this case an important question of federal law which has not been, but should be, settled by this Court,—a legal question which affects not only Petitioner but everyone of the hundreds of holders of Federal Power Commission licenses. The determination of this question necessarily has a far-reaching effect upon present investments of billions of dollars, as well as untold amounts in future projects. The whole industry of privately licensed hydroelectric projects has been financed and built under the assumption that a license, duly issued and accepted, is a binding contract, not susceptible of alteration except on mutual agreement between the Commission and the licensee. But now we are faced, in this case, with a rule of law which, if carried to a logical conclusion, characterizes a federal power license as an "open-end" license, susceptible of being changed in any respect by the Commission whenever approval of new construction designs or any amendment is proposed. Since the usual term of a license for a project is 50 years, and the whole art is a constantly changing one, it is inevitable that some type of amendments will be required during the life of almost every license; the whole industry is of necessity dynamic rather than static. This situation emphasizes the importance of this Court considering and establishing a rule as to the power of the Commission to unilaterally alter or amend an existing accepted license.

According to the Annual Report of the Federal Power Commission for 1964, page 71, there were 554 licenses in effect at the end of the 1964 fiscal year, of which 295 were for major projects. Every one of these licenses and licensees,—their customers and investors,—are affected by this decision.

The above 295 projects under major license accounted for approximately 18,464,000 kilowatts of installed electric generating capacity, and provided for 30,-101,493 kilowatts of potential capacity. Ultimate installations under major licenses involved an estimated or claimed cost of nearly $6,700,000,000. At the end of fiscal 1964, the capacity under licenses was about 75 percent of all non-federal hydroelectric capacity in the United States. This case, therefore, does not present a federal question of particular import only to this Petitioner here, but a question affecting the meaning and application of the Federal Power Act as it applies to hundreds of licensees, present and future (FPC 1964 Annual Report, pp. 70-71).

2. The question presented in this case is of extreme importance in the administration of the Federal Power Act. In the light of the Commission order involved herein, there will be present in every future application for approval of construction designs or any amendment of license uncertainty as to the extent of the Commission's authority in changing or altering the existing license status. Every license holder will, of necessity, be concerned with the extent of exposure of its existing rights in applying for an amendment which it may believe to be required to bring its project up to full capability. And, of course, the Commission and its Staff will very properly desire to be informed as to the guide lines controlling its power to alter and amend other portions of the license when a specific amendment is requested. It would be greatly in the public interest to have this question which is clearly and precisely presented herein, definitely decided at this time.

3. Both the legislative history and the text of the Act itself reveal a clear and unequivocable intention to

make a Federal Power license, after formal acceptance, a fixed and definite contract, capable of being changed only upon mutual agreement of the parties; and that this concept was based upon the belief that such a definite statement of right would encourage development of and facilitate low cost financing of projects, inasmuch as it would give prospective investors a definite and binding description of the entity to be financed.

When the Act was before Congress, Mr. O. C. Merrill, then Chief Engineer of the U. S. Forest Service, and who later was the Commission's first Executive Secretary (1920-1929), testified at length before the special Water Power Committee of the House, explaining the bill which was under consideration. He said:[1]

> "Mr. Merrill. I think there is no doubt that the commission would have authority to modify the license on application, but not authority to modify the license to the prejudice of the licensee without the licensee's consent. The license is in the nature of a contract, and a contract could be modified at any time by agreement of the contracting parties" (page 73).

And again, on the question of tenure and a licensee's security during the license term:

> "Mr. Merrill. Yes; if it is not clear already, because I think it is extremely important that the licenses when issued shall be contracts and that they shall not be canceled when there are any other means left for enforcing the provisions" (page 88).

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[1] Statement of O. C. Merrill, Chief Engineer, U. S. Forest Service, at hearings before House Special Water Power Committee (1918), 65th Congress, 2d Session, pp. 73, 88 and 465.

At the same hearings, Congressman Haugen, discussing term and tenure of licenses with Secretary of the Interior Lane, stated as follows:

> "Mr. Haugen. If we fix the terms now you start with a new deal. My idea would be that the contract—and this license is a contract—should be made for 50 years, and at the end of 50 years that terminates the contract, and then we must trust to future Congresses as to what terms shall be fixed for the renewal of the license" (page 465).

The Federal Water Power Act was enacted in 1920 following several years of painstaking study by Congress to provide a law which would encourage development of the water power resources of the Nation. Following the First World War, it was recognized that the United States must provide some means whereby power projects could be financed and constructed by private capital, in order to keep pace with the country's rapidly growing needs. Water power development had practically ceased in the Nation, due to lack of tenure and uncertainty of terms under existing laws and procedure. This was particularly true on navigable streams, where a special act of Congress was required in each instance. (See First Annual Report, Federal Power Commission, 1921, pp. 5-6, 16). The purpose of the Act was to encourage and promote water power development, under safeguards which would protect both investors and the resource, for the good of the Nation. One of the matters which received extended discussion was security of tenure and license terms.

That this discussion was controlling and expressed the true intent of Congress is completely revealed by the terms of the Act itself. Section 6 of the Act spelled out as definitely and precisely as the working of logical

draftsmen, and the use of the English language could do so, that it was the intent of Congress that an accepted license could be changed or altered only by mutual consent. And Section 28 of the Act took the unusual step of providing that even repeal of the Act itself would not alter or change existing licenses. What more could the Congress do to prescribe that a license was a definite, fixed and binding contract?

From the very beginning, the Commission itself so specifically characterized licenses issued by it. In fact, it has uniformly done so until the present proceedings.

In its First Annual Report (1921), the Commission summarized the matter as follows (page 5):

> "The approval of the Federal Water Power Act on June 10, 1920, marked the end of the period of discussion and controversy which for more than a decade had waged both in Congress and outside over a national policy with respect to water powers under Federal control. The laws previously governing the administration and disposition of water powers had been passed, the one in 1901 and the other in 1910, at a time when there was little appreciation of the role which electric power would play in transportation and in industry, or of the safeguards which, in the disposition of this national resource, would be required in the interests of the investor as well as of the public. For many years Federal laws had been wholly unsuited to prevailing conditions. The rights granted were so insecure and the liabilities imposed so uncertain that only in occasional instances could water-power development which required Federal authority be financed; with the result that the development of the inexhaustible waterpower resources was largely blocked and recourse was had to steam power with its consequent use of coal. * * *"

In its First Annual Report, the Commission also said (page 50):

> "In place of the uncertain tenure and unknown requirement of previous legislation an applicant for a power project under the Federal Water Power Act may secure a license for a term not exceeding 50 years. *The license is a contract between the Government and the licensee, expressly contains all the conditions which the licensee must fulfill, and, except for breach of conditions, can not be altered during its tenure either by the Executive or by Congress without the consent of the licensee.* * * *" (Emphasis supplied.)

4. The decision of the Court of Appeals below is, by its own language, based upon an erroneous assumption. Likewise, both that opinion and the Commission order affirmed by it are contrary to the applicable statutory law. It seems fundamental that a license necessarily includes all transmission lines required to connect generating plants with primary transmission and distribution systems. If all such lines were not necessarily included in the hydroelectric project when it was licensed, the Commission performed a futile act. Generation of electricity with no connections to consumptive use would obviously serve no purpose.

But we need not rely on this assumption alone for here the previously constructed lines had been specifically licensed—and their licenses formally accepted in writing by the Petitioner.* In view of this fact it

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* Oxbow-Brownlee Lines, Licensed May 2, 1958, JA 13-20; Oxbow-Pallett Junction Lines, Licensed March 19, 1959, JA21-28; Boise-Brownlee-Baker Lines, Licensed Dec. 3, 1959, JA 28-34; Boise-Brady No. 2 Line, Licensed Dec. 14, 1960, JA 35-39.

is difficult to understand the statement in the opinion below (R. 117) that:

> "These transmission lines are not, as petitioner argues, included within the license; they have been expressly withheld."

In any event, the quoted statement is not supported by the record as to the previously licensed and constructed lines, but is contrary to the undisputed record. This alone requires a review of the decision. But also, the Court and the Commission have fallen into the legal error of assuming that a request for approval of designs opens up the whole license for alteration. We do not concede that a mere request for approval of design exhibits for a transmission line essential to the functioning of a licensed project is such an application. That is all that was before the Commission here. In acting on this request, the Commission inserted into the whole project the new concept of the Petitioner being required to "wheel" Federal power—even to the extent of being required to build *new capacity* in unlimited quantities upon demand. In fact, the new requirements are so sweeping and drastic as to in essence constitute the United States a partner in Petitioner's whole transmission network—and, in fact, a dominant partner.

The order affirmed is contrary to the fundamental purpose and intent of the Federal Power Act which was to accomplish orderly and proper development of the country's water resources, by giving licensees binding and conclusive licenses which would be firm foundations for financing and constructing hydroelectric projects.

If the judgment herein stands, any and all provisions of a license, even the most fundamental, are sub-

ject to a unilateral change, and the sanctity and validity of F. P. C. licenses are destroyed. The decision herein fails to state what the statutory provision providing that licenses may be altered only by mutual agreement means, *if it does not mean what it says.*

Carried to its logical conclusion, the reasoning of the Court herein means that all licensees must, at their peril, consider all projects "frozen" as described in the original license—for the Court below holds that any requested amendment or authorization reopens the whole license, even though the requested authorization is minor, but necessary to the effective completion of the licensed project, and was necessarily and in fact contemplated by the parties at the time the license was issued.

The F. P. C. order, affirmed by the Court below, to the extent that it requires licensee to build additional capacity, on demand (JA 87, ii) is apparently an attempt to avoid that Congressional control which requires both (1) Congressional authorization of any project and (2) appropriation of specific funds for construction of federal transmission lines. Is this not a "back door" approach to dodge Congressional control?

What the Commission has done, or tried to do here, by administrative interpretation and action, and the Court below affirmed,— is actually to amend or repeal a portion of the Act itself by attempting to effect and enforce an alteration of the license without the licensee's agreement thereto. Respondent's order and the judgment of the Court below are, therefore, not only in violation of both Sections 6 and 28 of the Act (*supra*) but also of Article I, Section 1 of the Constitution, which provides that the legislative powers of the Federal Government are vested in the Congress of

the United States. We respectfully submit that they are not thus to be usurped by the Federal Power Commission. As the Fifth Circuit aptly stated, "Congress could hardly have intended to delegate the power of legislative repeal by any such easy route." *Callery Properties, Inc.* v. *FPC,* 335 F. 2d 1004, 1017 (5th Cir. 1964).

CONCLUSION

In view of the combination, in this case, of the fact that the question presented is (a) an important question of federal law which has not been, but should be settled by this Court,—one of importance to every present and future licensee under the Federal Power Act, (b) is one whose final disposition is needful for orderly administrative proceedings before the Federal Power Commission, (c) was apparently decided by the Court below under misapprehension of the facts as to previously licensed transmission lines, and (d) was in Petitioner's opinion decided erroneously by both the Federal Power Commission and the Court below, this case presents a proper case for consideration by the Supreme Court.

For the foregoing reasons herein set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1965

APPENDIX A

(346 F. 2d 956; also R. 113-117)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,637

IDAHO POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

[June 4, 1965]

On Petition to Review an Order of the
Federal Power Commission

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

These are proceedings to review an order of the Federal Power Commission in connection with the licensing of hydroelectric project works on the Snake River, Idaho, under § 4(e) of the Federal Power Act, 49 Stat. 840 (1935), 16 U.S.C. § 797(e) (1958).

Petitioner sought authority to construct two additional transmission lines in connection with its already licensed project. Authority was granted, provided that petitioner make surplus capacity of the project's transmission facilities available to the Government for the wheeling[1] of Government power at Government expense. On this review petitioner challenges the authority of the Commission to

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[1] "Wheeling" is the transmission of one company's power over another company's system.

impose such a condition, and seeks to have it declared invalid.

On August 4, 1955, the Commission issued petitioner a fifty-year license under the Federal Power Act, *supra*, for a hydroelectric project to consist of three power developments located on that portion of the Snake River which forms the boundary between Oregon and Idaho. The license followed hearings on three separate applications by petitioner for the Oxbow, Hell's Canyon and Brownlee developments, which had been consolidated for hearing. The license applications contain specifications for the proposed project work, including the proposed primary transmission lines.

The applications were vigorously opposed on the ground that the resources should be reserved for public development by the United States. There being no formulated or contemplated plans for Federal development at that time, the Commission granted petitioner's application and the Court of Appeals for the District of Columbia sustained the Commission's action. *National Hell's Canyon Ass'n* v. *F.P.C.*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1957).

The license provides that the three developments shall be considered as units of one complete project. It specifically lists the individual project works licensed as part of the project. No transmission facilities were then specified. Instead, by Article 45 of the license, it was provided:

> "The Commission expressly reserves the right to determine at a later date the question of what transmission lines and appurtenant facilities, if any, shall be covered in this license and included as part of the project works."

Since the project was to occupy public lands, petitioner was required by Article 44 to:

> "* * * pay to the United States such charges as may be specified hereafter for the purpose of recompensing

the United States for the use, occupancy and enjoyment of its lands, including transmission right-of-way."

Thereafter, at petitioner's request, the license was amended several times to include transmission lines within the project license. No wheeling conditions were imposed in any of these orders.

In September, 1963, petitioner requested amendment of the license to include two 230,000-volt circuits extending a distance of about 100 miles, 27 miles of which were through Government land, and 1.75 miles within the Boise and Payette National Forests. The Commission advised the Secretaries of Agriculture and the Interior of the application, and requested their views.

The Secretary of the Interior recommended that any authorization for construction of the lines should be conditioned upon the Commission's reserving the right to require petitioner to wheel Government power over the company's entire main transmission system. He explained that this might enable the Government to defer construction by the Bonneville Power Administration of a high-capacity line connecting the main Federal Columbia River Power System to the Upper Snake River System; that Bureau of Reclamation plants in Southern Idaho would shortly be unable to meet their power requirements and would need a part of Bonneville's surplus.

The Secretary of Agriculture also recommended a wheeling condition, stating that this would "minimize the use of public lands for transmission line rights of way" and thus "contribute greatly to the objective of 'assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.' Federal Power Act, § 202(a) [49 Stat. 848 (1935), 16 U.S.C. 824(a)]."

On July 24, 1954, by amendment No. 9 to the license, the Commission granted the requested authority for the construction of the lines, subject to the condition that petitioner make available to the Government on a reasonable cost basis, all surplus transmission capacity within the primary lines of the project, and, upon appropriate request and at least one year's notice, increase the transmission capacity of the project transmission lines at the Government's expense. Under the license conditions, the Government's wheeling is limited to "such amounts as will not unreasonably interfere with the Licensee's use of said lines," and to transmission "only to consuming facilities of the United States and to public bodies and co-operatives entitled to statutory perference in connection with the distribution and sale of electric energy by the United States."

Petitioner, with the Commission's consent, filed an acceptance of the amendment, reserving the right "to object, upon timely court review of the Commission's order, to the lawfulness of the wheeling condition."

The lawfulness of that condition is thus the issue here presented.

The propriety and reasonableness of such a license condition is established by *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17 (1952). In that case the power company applied for a license for a project which included, *inter alia,* two transmission lines. The FPC authorized the project but imposed the condition that the licensee permit the United States to connect with the transmission facilities and transfer power generated at its own plants over the licensee's lines. In discussing Part I of the Federal Power Act, the Court stated:

> "Under these sections the Commission is plainly made the guardian of the public domain. The requirement that existing lines be fully utilized before additional lines are authorized would seem to be relevant

to a decision under § 10(a) that the project submitted was consonant with the 'comprehensive plan' for the waterway. And the Commission might well determine under § 4(g) that if public lands are to be used for the transmission of power, conservation of the 'water-power resources of the region' requires that public power as well as private power be transmitted over them.

Sections 4 and 10 speak specifically of the public domain—waterways and public lands. Section 6 makes each license subject to all the terms and conditions of the Act and to 'such further conditions, if any, as the Commission shall prescribe in conformity with this Act. . . .' Section 6, read in the context of §§ 4 and 10, would seem to give ample authority to the Commission to attach the conditions imposed here. Protection of the public domain, conservation of water-power resources, development of comprehensive plans for the waterways—each of these might on the facts of a case be sufficient to authorize the grant of permission to a public utility company to use the public domain provided it agreed to use its excess capacity to transmit government power."

Petitioner seeks to distinguish that case upon the ground that there the condition attached to the license as originally issued. Here, it is asserted, the license issued included and contemplated the construction of necessary transmission lines. The future licensing of transmission lines was not reserved, it is asserted; what was reserved was only the right "to determine at a later date" what transmission lines "shall be covered in this license and included as part of the project works." Our attention is directed to § 6 of the Federal Power Act, 49 Stat. 841 (1935), 16 U.S.C. § 799 (1958), providing that "Licenses may be altered • • • only upon mutual agreement between the licensee and the Commission • • •."

Petitioner contends that the license as issued must be construed to include such transmission lines as are necessary, since anything less would leave the project incomplete; that the imposition of the wheeling condition amounts to an "alteration" of the license, or to a refusal to do that which is essential to its completion unless petitioner submits to an alteration. This, petitioner contends, is alteration of the license by duress and not by agreement.

We cannot agree.

These transmission lines are not, as petitioner argues, included within the license; they have been expressly withheld. No agreement has been reached as to them. If they are to be included the license must be amended to include them. Reasonable conditions can be attached to an amendment of the license, *Montana Power Co.* v. *F.P.C.*, 298 F.2d 335 (D.C. Cir. 1962), as well as to its original issuance, Federal Power Act § 204, 49 Stat. 841 (1935), 16 U.S.C. § 799 (1958), and the reservation of a licensing of transmission lines reserves the right to attach reasonable conditions to the amendment by which they are licensed. If such conditions relate to the subject of the amendment, they then relate to that upon which agreement has been withheld, and do not constitute an "alteration" of that which had already been agreed upon.

The fact that the wheeling requirement attaches to already licensed transmission lines, as well as to those approved by the amendment, does not render the requirement to that extent unrelated to and an unreasonable condition of the amendment. The Commission as "guardian of the public domain" has simply and reasonably required "that existing lines be fully utilized before additional lines are authorized." *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 23 (1952).

The order of the Commission is affirmed.

UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

(R. 118)

No. 19,637

IDAHO POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

Decree

Before: Hamley, Merrill and Browning, Circuit Judges.

This cause came on to be heard upon petition of Idaho Power Company filed October 23, 1964 to review an Order of the Federal Power Commission issued by it on July 24, 1964.

The Court heard argument of respective counsel on April 5, 1965 and has considered the briefs and pleadings filed in this cause.

On June 4, 1965, The Court being fully advised in the premises, handed down its opinion and in conformity therewith, it is ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Order of the Federal Power Commission be and hereby is affirmed.

Decree: Filed and entered June 4, 1965

FRANK H. SCHMID, *Clerk*

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 630

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

* * * * *

OPINION BELOW

The opinion of the court of appeals (R. 113–117) is reported at 346 F. 2d 956.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965 (R. 118). A timely petition for rehearing was denied on July 8, 1965 (R. 119), and the petition for a writ of certiorari was filed on September 29, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).[1]

[1] The petition (p. 2) also asserts jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. The courts have consistently held that this section does not enlarge Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), which duplicates Section 313(b) of the Power Act. *Federal*

QUESTION PRESENTED

Whether the Federal Power Commission, in authorizing enlargement of the transmission facilities of a licensed hydroelectric project by the addition of new lines, may impose a condition requiring the licensee to make surplus transmission capacity of the project's entire transmission system available for transmitting government power at government expense.

STATUTE INVOLVED

The pertinent sections of the Federal Power Act are Sections 4(e) and (g), 6 and 10(a), 16 U.S.C. 797(e) and (g), 799 and 803(a).

Sections 4(e) and (g) provide:

> SEC. 4. The Commission is hereby authorized and empowered—
>
> * * * * *
>
> (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the

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Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500; *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (C.A.D.C.); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 798 (C.A. 5), certiorari denied, 352 U.S. 903; *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461, 465 (C.A. 10). The same rule has been applied under the Power Act. *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436 (C.A. 10).

development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation * * *.

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

Section 6 is set out at pp. 4–5 of the petition.

Section 10(a) provides:

> SEC. 10. All licenses issued under this Part shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

STATEMENT

In 1955 petitioner was authorized, by a single Federal Power Commission license, to construct three power developments on the Snake River in Idaho and Oregon. *Idaho Power Company*, 14 F.P.C. 55 (R. 3–11), affirmed *sub nom. National Hells Canyon Association v. Federal Power Commission*, 237 F. 2d 777 (C.A.D.C.), certiorari denied, 353 U.S. 924. With respect to transmission facilities the license provided as follows (R. 10):

> Article 45. The Commission expressly reserves the right to determine at a later date the question of what transmission lines and appurtenant facilities, if any, shall be covered in this license and included as part of the project works.

Thereafter, on petitioner's applications, the Commission from time to time amended the license to include transmission lines,[3] each time increasing the annual payment required of petitioner because of the increased use of government land.[4]

In September 1963, petitioner applied for authorization to construct two additional transmission circuits 101.7 miles in length (R. 39–41).[5] They cross 27 miles of government land, including 1.75 miles of the Boise and Payette National Forests (R. 42, 53, 57). The Secretaries of Interior and Agriculture recommended the granting of the application but urged that it be made subject to a "wheeling" condition.[6] They stated that such a condition would enable the government to defer construction of a Bonneville Power Administration transmission line, for which an initial appropriation of $1,000,000 had been requested, and would additionally "minimize the use of public lands for

[3] See Amendments Nos. 1 (R. 13–18), 2 (R. 21–26), 4 (R. 28–33) and 6 (R. 35–38).

[4] By the amendment licensing the first transmission line, Article 45 was amended to read as follows [R. 18]: "The Commission expressly reserves the right to determine at a later date the question of what additional transmission lines and appurtenant facilities, if any, shall be covered in this license and included as part of the project works."

[5] The application itself did not expressly request "amendment of the license," but petitioner repeatedly referred to it as an "application for amendment of the license" (R. 46, 58), and the Commission treated it as such. The two transmission circuits covered by the application are referred to in the opinion below (R. 117) as "not * * * included within the license; they have been expressly withheld," obviously by reason of Article 45 and the prior amendments licensing other lines.

[6] "Wheeling" is the transmission over one company's system of another's electric power.

transmission line right-of-way" and thus enhance the Power Act's objective of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources" (R. 42–45, 53–58). Petitioner responded that it was then, and intended to continue, wheeling government power, but it objected to an express condition to that effect (R. 45–49, 57–58).

By order of July 24, 1964 (R. 61–68; 32 F.P.C. 343–344), the Commission granted the requested authority, subject to the wheeling condition, which the court below summarized as follows (Pet. 4a):

> * * * that petitioner make available to the Government on a reasonable cost basis, all surplus transmission capacity within the primary lines of the project, and, upon appropriate request and at least one year's notice, increase the transmission capacity of the project transmission lines at the Government's expense. Under the license conditions, the Government's wheeling is limited to "such amounts as will not unreasonably interfere with the Licensee's use of said lines," and to transmission "only to consuming facilities of the United States and to public bodies and co-operatives entitled to statutory preference in connection with the distribution and sale of electric energy by the United States."

The court of appeals affirmed the Commission's order on the ground that the condition was reasonably related to the subject of the amendment and that it was not rendered improper merely because the condition attached to project transmission lines already

licensed as well as to those that had not been previously authorized (Pet. 6a).

ARGUMENT

The decision of the court of appeals was correct and it does not conflict with any decision of this Court or of any other court of appeals. No important federal question unresolved by this Court has been presented. Consequently, there is no occasion for further review.

The validity of a wheeling condition such as that involved here was established by *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. The fact that the condition here refers to surplus capacity of previously licensed transmission lines as well as of the lines for which authorization is being sought does not affect its validity. All that the Commission has done, in effect, is to authorize enlargement of project transmission facilities only if existing ones are fully utilized, and its condition therefore necessarily affects use of the previously licensed and constructed lines. There is no merit to petitioner's contentions that this makes the earlier licenses "open-ended" (Pet. 13–14) or that it alters them in violation of the prohibition upon unilateral changes included in Section 6 of the Power Act (Pet. 14–18). The wheeling requirement has not been imposed upon the earlier licenses; it has merely been prescribed as a reasonable condition upon the licensing of additional facilities. Cf. *Montana Power Co.* v. *Federal Power Commission*, 298 F. 2d 335, 340 (C.A.D.C.).

In here conditioning petitioner's right to enlarge the project transmission facilities upon petitioner's

making the surplus capacity of all project transmission facilities available to the government at government expense, the Commission was following the rationale of this Court in the *Idaho Power* case, *supra*.[4] As the court of appeals observed (R. 117):

> "* * * The Commission as 'guardian of the public domain' has simply and reasonably required 'that existing lines be fully utilized before additional lines are authorized.' *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 23 (1952)."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor, Federal Power Commission.

OCTOBER 1965.

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[4] The condition that was upheld in *Idaho Power*, *supra*, first appeared in an order of October 13, 1949 (8 F.P.C. 1177–1183), superseding a licensing order previously issued March 2, 1948 (7 F.P.C. 435). The earlier order, like the original licensing order here (*supra*, p. 4), had issued a license for all of the project except transmission lines, which it left for later determination, and the project works thereby licensed had been practically completed when the superseding order added two 138 kv (single circuit) transmission lines, one 73 miles in length, the other 116 miles.

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CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 630

IDAHO POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

RESPONDENT'S VERSION OF "QUESTION PRESENTED" IS NOT ACCURATE

The statement of "Question Presented" in the brief (p. 2) of Federal Power Commission (F.P.C.) is neither candid, fair nor accurate. A full statement of the questions necessarily involved in and presented by this action is set out in the petition for certiorari (pp. 2-3).

F.P.C. states that the only question is the right of F.P.C. to "impose a condition requiring the licensee

to make surplus transmission capacity of the project's entire transmission system" available for transmitting government power. So stated, the question ignores:

(a) The fact that the F.P.C. order goes far beyond "surplus capacity" and obligates the licensee to increase the capacity of the system, as requested by the Secretary of the Interior, without limit as to time or capacity (Jt. App., pp. 64-65).

(b) Adds numerous other new conditions to the licensee's use and operation of all project lines (Jt. App., pp. 64-68).

(c) The fact that these obligations are imposed on lines (project works) previously licensed and constructed.

(d) And, most importantly, that the impact of the F.P.C. order, and the decision of the Court below, is that a license for specific project works is merely an "open end" license,—subject to unilateral alteration by F.P.C.,—in spite of the specific prohibition of such action by Section 6 of the Federal Power Act.

STATUTES INVOLVED

The basic statute involved herein is Section 6 of the Federal Power Act, 16 U.S.C., Sec. 799:

> "Licenses under sections 792, 793, 795-818, and and 820-823 of this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this

chapter, *which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be* revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be *altered or surrendered only upon mutual agreement between the licensee and the Commission* after thirty days' public notice. Copies of all licenses issued under the provisions of sections 792, 793, 795-818, and 820-823 of this title and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41. June 10, 1920, c. 285, § 6, 41 Stat. 1067; Aug. 26, 1935, c. 687, Title II, § 204, 49 Stat. 841."

Also, Section 28 of the Act, 16 U.S.C., Sec. 822, set forth in full in the Petition, p. 5.

ARGUMENT

It is of vital importance to all holders of F.P.C. hydroelectric licenses, and to the Commission itself, for this Court to specifically outline the extent of the Commission's power to unilaterally alter existing licenses without mutual agreement between Commission and licensee. Absent such determination, the decision of the Court below will leave the whole question in such a state of confusion that there will be of necessity years of expensive hearings and litigation.

Basic in this case is the realization of the difference between "project" and "project works." It has been well stated in *Lake Ontario etc. Assn.* v. *F.P.C.*, 212 F. 2d 227, 232 (C.A.D.C., 1954), cert. denied 347 U.S. 1015:

> "[2] Petitioners' contentions rest in large part upon the erroneous premise that the Power Commission licenses projects as such. The Federal

> Power Act is not cast in that form. The Commission licenses facilities—dams, powerhouses, transmission lines, and other 'project works' of various sorts—not projects as such. Care must be taken in any consideration of this statute lest an inadvertent shifting of the terms 'project' (which is a whole development) and 'project works' (which are structures) cause confusion."

Here the "project works" were defined by F.P.C. in its original license as to each of the individual units comprising the "project." And, each description of the project works concluded with the phrase "and transmission facilities" (Jt. App., pp. 6-7). There is no question but that the transmission facilities involved herein are transmission facilities required to complete Project 1971 by providing the means for conveying the power and energy generated at the plants to licensee's transmission system for distribution and use.

But it is not necessary for Petitioner to rely on this general description. For each of the previously constructed lines,—separate "project works" under the accepted designation,—*was individually and specifically licensed.* (Oxbow-Brownlee, May 2, 1958, Jt. App., p. 17; Oxbow-Pallette Junction-Divide, March 19, 1959, Jt. App., p. 25; Brownlee-Boise Bench, Dec. 3, 1959, Jt. App., p. 32; and Boise-Brady No. 2, Dec. 14, 1960, Jt. App., p. 37) It is undisputed that such "project works" separately and specifically authorized, constitutes a licensing thereof. *Lake Ontario etc. Assn.* v. *F.P.C., supra; Montana Power Co.* v. *F.P.C.,* 298 F. 2d 335, 340 (C.A.D.C., 1962).

Here the licensee asked for approval of plans for a badly needed additional line required not only for

transmission of the power from the soon to be added third generating unit (the Hells Canyon unit), but also for transmission from existing units which were about to be overloaded (Inman letter to F.P.C., Jt. App., p. 45; Roach telegram, Jt. App., p. 60). This line was a separate "project works," and the action of the Commission in calling it an amendment was erroneous under *Montana Power Co.* v. *F.P.C., supra:*

> "* * * Thus, the additional authority, although called an amendment, was a new and original license for the third unit, within the meaning of Section 4(e) of the Act, and was subject to the requirements of Section 10(e) with respect to the use of the tribal lands."

Confronted with this situation F.P.C. had no power, in issuing this license for new project works, to include therein unilateral material changes in licenses already issued and accepted for other project works (i.e., transmission lines). The Commission's sole function and authority was to determine the need, propriety, feasibility of, and conditions applying to the *new line.* It had no authority to materially alter existing licenses. Section 6 of the Federal Power Act specifically and without ambiguity prohibits this.

And it is important that this Court consider and define the Commission's authority in this respect. For, contrary to F.P.C.'s brief herein, we do have a difference between two courts of appeals. That of the District of Columbia in *Montana Power Co.* v. *F.P.C., supra,* states that authorization of a new project works is a new license, while in this action the Ninth Circuit Court states that it is an amendment and opens all previous parts of the project (even though they are

separately licensed "project works") to unlimited changes, under the guise of conditions.

The vice of F.P.C.'s position herein is that the licensee was compelled to act under coercion, just as great as though a gun were pointed at it. It had waited from September 9, 1963, (Jt. App., p. 39), a period of 10 months, for approval of a line, needed to forestall a regional catastrophe. And then found itself confronted with the proposition that it would be permitted to build this line only if it was willing to agree that its whole project transmission system was to be operated in partnership with the government, not only its surplus capacity *but also* with a requirement for unlimited future construction responsibility to "wheel" government power. The assistance of this Court is required to correct this wrong,—and to prevent other licensees from finding themselves in the same position.

CASES RELIED ON BY COURT BELOW DO NOT SUSTAIN ITS POSITION

Both the Court below and the F.P.C. here rely, erroneously we believe, upon the case of *Montana Power Co.* v. *F.P.C., supra,* as sustaining their position. In the first place, the factual situation was distinctly different. In a previous license F.P.C. had first authorized a three-unit project, then after it had been licensed as a two-unit project, fixed the amount to be paid annually to the Indian tribe on whose lands the project was located. Years later the licensee requested a license for a third unit and the Commission in licensing this unit increased the annual fees to be paid the Indian tribe. It is clear that this increase was due *solely* to the third unit. The Commission

there *did not,* as here, make any changes or alterations as to previously licensed "project works." On the contrary, the Court held, as noted above, that a license amendment for the addition of a third generating unit to an existing licensed project was actually a new and separate license for that unit, as an additional "project works"; that licenses under the Act cover only specific "project works," and not necessarily a complete "project." The two licensed units and other described project works were under a separate and previous license. (See also *Lake Ontario etc. Association* v. *F.P.C.,* 212 F. 2d 227, 232, cert. denied 347 U.S. 1015).

In the *Montana Power* case, the C.A.D.C. said (298 F. 2d 335, at 339):

> "* * * When the petitioner sought authority for a third unit, the Commission granted it by way of further amendment to the original license to show the newly authorized third unit was a project works for an existing project; but it was by no means a part of the project works theretofore licensed. Thus, the additional authority, although called an amendment, was a new and original license for the third unit, within the meaning of Section 4(e) of the Act, * * *"

The Commission, the Court held, was issuing a new license for the third generating unit, and was therefore not altering the previously issued license when it increased the overall annual charge as a result of the added third unit.

The Court below reads the *Montana Power* case as permitting the alteration of separate and previously issued licenses, agreed to and accepted by the licensee, by adding new and additional terms and conditions

relating to previously licensed lines, which were not expressed in those earlier licenses for these lines, and were not agreed to or accepted by the licensee. There is, then, certainly a conflict or material uncertainty as between these two decisions of different courts of appeals. Here, the license order of the Commission effectively altered four previously issued licenses for transmission lines (see Petition, p. 18, footnote; and Respondent's brief in opposition, p. 5, footnote 2), as well as the original project license, by adding thereto new terms and conditions not expressed in any previously issued license, and not agreed to by the licensee by acceptance thereof, as required by Section 6 of the Act to be "expressed in said license."

The Commission stated in its brief in opposition (p. 7), that "The wheeling requirement has not been imposed upon the earlier licenses; it has merely been prescribed as a reasonable condition upon the licensing of the additional facilities."

With due respect, this would seem to be somewhat of a play on words, of the "now you see it, now you don't" variety. Apparently, it is claimed, you don't "impose" the wheeling condition upon the earlier licenses and lines, and therefore the licenses are not "altered"; you merely "prescribe" additional terms and conditions which alter the previous licenses by adding such requirements in a new license for other project works. And thus, Section 6 of the Act is evaded by administrative agency action, and the Act is effectively amended so as to avoid the rights assured under both Sections 6 and 28.

Likewise, the case of *F.P.C.* v. *Idaho Power Company*, 344 U.S. 17 (1952), relied on so strongly by

F.P.C. and the Court below is not controlling here *on the question of the right of F.P.C. to unilaterally alter existing licenses.* As pointed out by Justice Douglas in the opening paragraph of that opinion the F.P.C. licensed the Bliss power plant, and two transmission lines required to transmit its power to licensee's primary transmission system, in *the license.* All that the Commission had previously done was to grant licensee permission to proceed at its own risk. So that as a matter of law, when the actual license was issued, licensee had the option whether to accept it, or refuse and abandon the work already accomplished. But in any event *it did not purport to alter any existing licenses.* And it is not relevant authority on the basic question involved here. It may be emphatically stated that neither *Montana Power Co.* v. *F.P.C., supra,* nor *F.P.C.* v. *Idaho Power Co., supra, the only authorities relied on,* are in point or controlling here.

Petitioner has no quarrel with the decision of this Court in this previous case (*F.P.C.* v. *Idaho Power Co., supra*), but it earnestly urges that the ruling therein is being pushed far beyond any reasonable intention of this Court. And the very apt phrase that F.P.C. is "guardian of the public domain" is being given interpretations far beyond its real meaning. Certainly, as such guardian, F.P.C. does not have unlimited power to impose upon its licensees such ideologies of public v. private power as its members may from time to time entertain. Or permit it to unilaterally alter basic rights specifically spelled out for licensees by precise language in the Act (Sec. 6, Federal Power Act). Or allow a licensee, as to existing facilities, to have imposed upon it a dominant partner.

Here licensee had built and was building generating plants and transmission lines designed to serve the needs of the service area designated in its certificates of convenience and necessity issued by appropriate public bodies. It had the statutory duty to do this. It had planned for this. Its long range financing and its sale of securities were based on this concept.

At any given time there is just so much market for power in this service area. If government power is to usurp licensee's existing facilities and serve some of this market, just to that extent will the licensee be deprived of sales. As stated before, if licensee proceeds with new construction knowing it will have this imposed competition, that is one thing. But to have it imposed *retroactively* upon project works licensed, financed, constructed with no such obligatory partnership is distinctly another.

Here F.P.C. has imposed upon licensee's previously licensed project works an unwelcomed partner,—in fact one that will inevitably be a *managing partner*. The new Article 49 (Jt. App., pp. 64-68) is all encompassing. In addition to admitting the government to use of surplus capacity, the new Article not only limits licensee's right to convert to greater capacity, but *requires* it to convert to greater capacity for government use upon request. The United States is given unlimited right of interconnection, licensee shall not open connecting switches, it must operate in parallel with the government system, licensee cannot recapture for its own use any capacity used by the government in less than 36 months, etc.

In licensing this project the Commission pointed out that tax-free power produced at plants financed by the government's low interest rates will of necessity sell at prices greatly below those that licensee must charge (Jt. App., p. 3). In fact, B.P.A. power sells in licensee's area for *less than the taxes licensee pays.* One does not require a crystal ball to see what will happen to licensee with a managing partner using licensee's facilities to sell a competitive product at a cut rate.

In short, to twist the "guardian of the public domain" theory as has been done here is contrary to the basic theory of the Federal Power Act, which was to encourage private development by assuring 50-year definitive licenses, which could be unalterable bases for planning, building and financing.

Here the effect on public land is minimal. Out of the millions of acres of U.S. owned land in Idaho, the new lines cross 1¾ miles of forest (without any damage, Jt. App., p. 57) and about 25 miles of desert. The so-called "surplus" referred to in F.P.C.'s "Question Presented" (brief, p. 2) is non-existent (Jt. App., pp. 46-47, 60).

We respectfully submit that this Court should look beneath the superficial concept of this action presented by the F.P.C., and consider and determine the basic issues involved.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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